Supreme Court, U.S.
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No. 99-1407

IN THE

Supreme Court of the United States

FRANK'S CASING CREW & RENTAL TOOLS, INC.,

Petitioner,

v.

MARINE DRILLING MANAGEMENT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Marine Drilling Management Co., is a wholly-owned subsidiary of Marine Drilling Companies, Inc.

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PRELIMINARY STATEMENT

Frank's Casing Crew & Rental Tools, Inc., ("Frank's"), the Petitioner herein, seeks review of a judgment of the United States Courts of Appeal for the Fifth Circuit decided on October 22, 1999, reversing the judgment of the United States District Court for the Western District of Louisiana in favor of Frank's. The opinion of the Fifth Circuit is published under the style *LeBlanc v. Global Marine Drilling, Co.*, 193 F.3d 873 (5th Cir. 1999).[1] The memorandum opinion of the District Court is unpublished.[2]

The central issue presented for review is whether the Petitioner's contractual obligation to procure liability insurance naming Respondent as an additional assured should be voided under the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 905(b). The Fifth Circuit and the Ninth Circuit Courts of Appeal have held previously that such a contractual obligation is not void under Section 905(b).[3]

STATEMENT OF JURISDICTION

Frank's in its Statement of Jurisdiction herein does not contest jurisdiction in the District Court or the Fifth Circuit.

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1. The Fifth Circuit's opinion is reprinted in Petitioner's Petition for Writ of Certiorari, Appendix 1(a).

2. The District Court's memorandum opinion is reprinted in Petitioner's Petition for Writ of Certiorari, Appendix 8(a).

3. *See Voisin v. O.D.E.C.O. Drilling Co.*, 744 F.2d 1174 (5th Cir. 1984), *cert. denied*, 470 U.S. 1053, 105 S. Ct. 1757, 84 L. Ed. 2d 820 (1985); and *Price v. Zim Israel Navigation Co. Ltd.*, 616 F.2d 422 (9th Cir. 1980).

However, in its argument in the Petition for Writ of *Certiorari*, Frank's alleges that jurisdiction was improper in the Fifth Circuit. The basis for Frank's argument is 28 U.S.C. § 1292(a)(3).[4] Frank's incredulously argues that this provision is mandatory, such that a failure to take an interlocutory appeal denies a party the right to take an appeal from a final judgment under 28 U.S.C. § 1291. This is against the great weight of authority in the federal courts.

The statute in question, 28 U.S.C. § 1292(a)(3), deals exclusively with admiralty cases.[5] The plaintiff, Murphy LeBlanc, did bring this action based on admiralty jurisdiction, and specifically invoked Rule 9(h) of the Federal Rules of Civil Procedure. As this is an admiralty case, Frank's attempts to use this provision to divest this Court of jurisdiction, due to the fact that Marine did not appeal the District Court's grant of summary judgment immediately, but waited until a final judgment was entered. Upon the grant of Frank's summary judgment, Frank's did not request the District Court to enter a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure. Instead, the parties, both Frank's and Marine, waited until the grant of final judgment on January 27, 1998. Now, Frank's attempts to shortcut this Court's jurisdiction by relying upon 28 U.S.C.

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4. 28 U.S.C. § 1292(a)(3) provides that the courts of appeal shall have jurisdiction from:

> Interlocutory decrees of such district courts or judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

5. *See Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292, 1297 (2d Cir. 1990).

§ 1292(a)(3). However, Frank's attempt must fail as the provision allowing interlocutory appeals in admiralty cases is permissive, not mandatory.[6]

The circuit courts are harmonious in holding that 28 U.S.C. § 1292(a)(3) is permissive, and not mandatory. The Fifth Circuit, in *Farbwerke Hoeschst A.G. v. M/V "Don Nicky"*[7] was faced with a case involving ruined cargo. The district court granted plaintiffs' motions for summary judgment on December 2, 1976, and entered final judgment on March 16, 1977. The defendants appealed this order on March 25, 1977. Plaintiffs' argued that the relevant statute at that time, 28 U.S.C. § 2107, required the appeal of an interlocutory order within fifteen days.[8] The Fifth Circuit disagreed, stating that "an appellant does not compromise its rights to review of interlocutory orders by waiting for a final judgment."[9]

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6. *See Farbweke Hoeschst A.G. v. M/V "Don Nicky,"* 589 F.2d 795, 797 (5th Cir. 1979); *Allied Towing Corp. v. Tatem*, 580 F.2d 702, 704 (4th Cir. 1978).

7. 589 F.2d 795 (5th Cir. 1979).

8. 28 U.S.C. § 2107, provided:

> In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

9. *Farbwerke*, 589 F.2d at 797 (citing *Caradelis v. Refineria Panama, S.A.*, 384 F.2d 589 (5th Cir. 1967); *Gloria Steamship Co. v. Smith*, 376 F.2d 46 (5th Cir. 1967)).

The case cited by Frank's for support of its allegation that this Court does not have jurisdiction is *Hamilton v. Williams*.[10] In *Hamilton*, the District Court was dealing with an injunction issued due to the unconstitutional conditions of Louisiana prison facilities.[11] In an effort to remove the injunction, there was a settlement agreement, and pursuant to that agreement the District Court entered three orders on September 26, 1996.[12] On October 23, 1996, there was a Motion to Reconsider and Vacate filed by the Hamilton plaintiffs.[13] The District Court denied the Motion to Reconsider.[14] On April 1, 1997, the District Court entered an order releasing all state facilities from Court supervision.[15] The Hamilton plaintiffs filed a notice of appeal on April 30, 1997.[16]

Since the *Hamilton* case deals with an injunction, the relevant statute in that case is 28 U.S.C. § 1292(a)(1), which provides the courts of appeals with jurisdiction of appeals

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10. 147 F.3d 367 (5th Cir. 1998). Obviously, this case was published at the time of oral argument of the case in the Fifth Circuit, and at the time of Frank's Petitions for Rehearing, but there was no argument made that the Fifth Circuit was without jurisdiction.

11. *Id.* at 369.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 370.

from interlocutory orders which grant, continue, modify, or dissolve injunctions.[17] Obviously, the present case is not concerned in the least with any injunction. The question for the Fifth Circuit in *Hamilton* was whether the September 26, 1996 Order or the April 1, 1997 Order was the dispositive order. The Fifth Circuit concluded that the dispositive order was entered on September 26, 1996, as it was self-executing and did not await the entry of another order. Instead, the September 26,1996 Order stated that the prison facilities would be released from Court supervision on April 1, 1997. Thus, the *Hamilton* court found that the September 26, 1996 Order was a *final judgment*, and therefore, a timely appeal should have been filed within thirty-days from September 26, 1996.[18] There is no mention of the need to appeal an interlocutory judgment, or risk losing the right to appeal that

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17. The full text of 28 U.S.C. § 1292(a)(1) provides the courts of appeals shall have jurisdiction of appeals from:

> Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

18. *Hamilton*, 147 F.3d at 371.

Judge Politz did note in *Hamilton*, however, that putting aside the issue of which order was the dispositive Order, the prior Order of September 26, 1996, would have been immediately appealable under 28 U.S.C. § 1292(a)(1).

decision. Frank's reliance on this case for support of its position that this Court is without jurisdiction is incorrect.[19]

A. Course of Proceedings and Disposition in the Courts Below

Marine Drilling Management Co. ("Marine"), contracted with Shell Offshore, Inc. ("Shell") to perform drilling services on a well located in the Gulf of Mexico.[20] Shell also contracted with Frank's to perform casing operations in connection with the drilling of the well by Marine.[21] Further, Marine and Frank's entered into a Master Service Contract ("MSC"), which is at the heart of this case. Plaintiff, Murphy LeBlanc, was employed by Frank's as a caser, and was working on the Marine 200, a jack-up drilling rig owned by Marine, working pursuant to the contract with Shell, when he was injured.[22] As a result of his injuries, LeBlanc sued Marine, and Marine in turn filed a third-party complaint against Frank's seeking contractual indemnity and additional assured status under Frank's liability insurance.[23] On August

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19. Frank's further cites *David Graves George v. Victor Talking Machine Co.*, 293 U.S. 377, 55 S. Ct. 229, 79 L. Ed. 649 (1933). Once again, this case deals with injunctive relief, not admiralty matters.

20. Record p. 276.

21. Record p. 276.

22. LeBlanc was injured when a shackle fell from some distance and struck him on the head. Record p. 276.

23. This claim was brought pursuant to the MSC between Marine and Frank's.

18, 1997, Frank's moved for summary judgment on Marine's third-party complaint.[24] The essence of Frank's motion was that there was no contractual indemnity owed to Marine by Frank's due to the anti-indemnity provision of Section 905(b), and further, because of the unenforceability of the indemnity provisions, the MSC between Frank's and Marine did not provide for additional assured status to Marine.[25]

Marine timely opposed Frank's Motion for Summary Judgment on September 4, 1997.[26] Marine took the position that, under the Fifth Circuit's decision in *Voisin v. O.D.E.C.O. Drilling Co.*,[27] Section 905(b)'s prohibition against indemnification by the vessel owner did not affect the contractual provisions requiring Marine to be named as an additional assured, and further, that the contract between Marine and Frank's did not require a valid and enforceable

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24. Record p. 260.

25. 33 U.S.C. § 905(b) provides, in part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such a person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this Title, and the employer shall not be liable to the vessel for such damage directly or indirectly and any agreements or warranties to the contrary shall be void.

26. Record p. 336.

27. 744 F.2d 1174 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1757, 470 U.S. 1053, 84 L. Ed. 2d 820 (1985).

indemnity agreement for the additional assured provisions to be applicable and enforceable.

On September 22, 1997, the District Court granted Frank's Motion for Summary Judgment, and, in its Memorandum Ruling, held that LeBlanc's personal injury did not arise out of the performance of the contract between Frank's and Marine, because Frank's was performing work for Shell, as opposed to Marine.[28] The court then concluded that since Frank's was not working for Marine, there was no duty to name Marine as an additional assured.[29] This ruling, however, directly contradicts the clear language of the contract between Frank's and Marine, which unequivocally provides that in situations such as the instant case, where Frank's is hired by Shell to work on Marine's drilling rig, Frank's is also to be considered as working for Marine for purposes of selected provisions of the MSC, specifically including insurance and indemnity.[30] On January 27, 1998, the District Court entered final judgment on Frank's Motion for Summary Judgment, and Marine filed a Notice of Appeal on February 11, 1998.

The two issues presented for appeal were whether the MSC between Marine and Frank's was applicable to the facts presented in this case and whether Frank's had a contractual duty to name Marine as an additional assured on its insurance policies.

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28. Record p. 393.

29. Record p. 393.

30. The action brought by LeBlanc has been settled by all Defendants, and all Defendants have been dismissed with prejudice by LeBlanc.

The Fifth Circuit found that the MSC does apply to the factual circumstances contained in this case.[31] In addition, the Fifth Circuit found that pursuant to its earlier decision in *Voisin v. O.D.E.C.O. Drilling Co.*,[32] the additional assured provisions of the MSC were applicable and valid under Section 905(b). Frank's further argued that under the terms of the contract, it did not owe an obligation to indemnify Marine due to Section 905(b), and thus, it did not have an obligation to name Marine as an additional assured because, it argued, the insurance provision was contingent upon the validity of the indemnity provision. The Fifth Circuit disagreed with Frank's, holding that Frank's obligation to list Marine as an additional assured automatically arose upon its agreement to indemnify Marine in Paragraph 7.2 of the MSC. Frank's filed a Petition for Panel Rehearing, and a Petition for Rehearing En Banc, both of which were denied.[33]

B. Factual Background

Plaintiff, Murphy LeBlanc, was employed by Frank's, and was performing services for Frank's aboard the Marine

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31. In particular, the Fifth Circuit found that the MSC applied because Paragraph 1.2 of the MSC provides that the indemnity and additional assured provisions of the MSC would be applicable as between Frank's and Marine when Frank's is working for a third party on a rig owned by Marine. *See LeBlanc v. Global Marine Drilling Co.*, 193 F.3d 873, 874 (5th Cir. 1999).

32. 744 F.2d 1174 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1757, 470 U.S. 1053, 84 L. Ed. 2d 820 (1985).

33. See Appendix 13a-14a, attached to Petition for Writ of Certiorari.

200, a vessel owned by Marine.[34] Frank's contracted with Shell to provide casing services in connection with drilling activities being performed by Marine.[35] Frank's also entered into an MSC with Marine. The MSC contemplates in Paragraph 1.2 that the contract provisions regarding indemnity and insurance apply when Frank's is performing work for others on Marine's vessels.[36] In particular, Paragraph 1.2 states that the provisions of Paragraph 6 apply as between Frank's and Marine. Paragraph 6.3 of the MSC required Frank's to name Marine as an additional assured on its insurance policies.[37] Also, the MSC required Frank's to indemnify Marine for claims such as LeBlanc's.[38]

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34. Record p. 276.

35. Record p. 276.

36. In particular, Paragraph 1.2 provides:

> With respect to work or service performed by Subcontractor [Frank's] pursuant to contracts or work orders *with other parties* as aforesaid on or for any drilling barges, vessels, platforms, installations or other property of any kind owned by, leased to, chartered to, under the control of, *or upon which Contractor may be performing services or operations*, paragraphs 6, 7, 8, 9, 10, 12 and 16 shall be applicable as between Contractor and Subcontractor. (Emphasis added.) (Record p. 279)

37. In particular, Paragraph 6.3 provides:

> Additionally, to the extent Subcontractor assumes liability hereunder, and agrees to indemnify Contractor, *Contractor shall be named an additional insured in all*

(Cont'd)

REASONS FOR DENYING THE WRIT

Review on a writ of certiorari is a matter of judicial discretion, not a matter of right.[39] Marine contends that the Fifth Circuit's ruling below was correct and that Frank's arguments do not reflect considerations that would support a discretionary review of this case by the Court on a writ of

(Cont'd)

such insurance policies (with the exception of Worker's Compensation coverage) with all such insurance being primary to any insurance of Contractor that may apply to an occurrence, accident or claim. (Emphasis added.) (Record pp. 283-284)

38. In particular, Paragraph 7.2 provides:

> Subcontractor [Frank's] agrees to protect, defend, indemnify and hold harmless Contractor [Marine], its officers, directors, employees or their invitees, and any party or parties for whom Contractor is performing services, from and against all claims, demands, causes of action of every kind and character without limit and without regard to the cause or causes thereof or the negligence or fault (active or passive) of any party of [sic] parties including the sole, joint or concurrent negligence of Contractor or the party or parties for whom Contractor is performing services, any theory of strict liability and defect of premises, or the unseaworthiness of any vessel (whether or not preexisting the date of this Contract), arising in connection herewith in favor of Subcontractor's employees, Subcontractor's subcontractors or their employees, or Subcontractor's invitees on account of bodily injury, death or damage to property. (Record pp. 284-285)

39. See Supreme Court Rule 10.

certiorari.[40] First, the decision of the Fifth Circuit is not in conflict with the decisions of this Court. The only legal issue presented by this Petition is whether Section 905(b) permits a clause requiring the vessel to be named as an additional assured. In regard to that issue, the Fifth Circuit correctly stood by its earlier decision of *Voisin*, which held that the 1972 Amendments to the LHWCA do not prohibit agreements between an employer and vessel owner respecting the procurement of insurance. This Court was previously asked to review the Fifth Circuit's decision in *Voisin*, and denied writs. The Petitioner, Frank's, alleges no conflict with a decision of this Court.

Second, the decision of the Fifth Circuit is not contrary to decisions rendered by other circuit courts.[41] To the contrary, the Fifth Circuit's decision is fully supported by and consistent with the decision of the Ninth Circuit Court of Appeals in *Price v. Zim Israel Navigation Co., Ltd.*,[42] where the Ninth Circuit upheld the validity of an additional assured provision in a contract between a vessel owner and a stevedore in the face of an argument that the provision was nullified by Section 905(b). *Voisin* and *Price* are the only two previous Circuit Court decisions addressing Section 905(b) and the requirement to procure insurance, and they are harmonious. Frank's cites no conflict between the Fifth Circuit's decision below and a decision of another United States court of appeals, and indeed, there is no conflict.

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40. See Supreme Court Rule 10.

41. See Supreme Court Rule 10.

42. 616 F.2d 422 (9th Cir. 1980).

Frank's further fails to cite any other consideration under Rule 10 for granting this writ of certiorari. It does not argue that the Fifth Circuit's decision "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call an exercise of this Court's supervisory power."[43] In summary, Frank's does not cite one single reason under Rule 10 why this case is worthy of review by the United States Supreme Court.

WAIVER OF ARGUMENT

In its Petition for Writ of Certiorari, Frank's casts the issue as whether the Fifth Circuit violated the intent and policies of 33 U.S.C. § 905(b). In reality, Frank's is asking this Court to overrule the Fifth Circuit and Ninth Circuit's prior rulings allowing a vessel owner to require a stevedore to procure insurance naming the vessel owner as an additional assured. However, it was not until this case reached the Supreme Court that this argument was raised. Heretofore, Frank's defended this case based on the inapplicability of the MSC, and the contractual language of the MSC. The argument that the MSC was inapplicable was based upon the premise that Frank's was not working for Marine, but instead, was working for Shell. The Fifth Circuit expressly refuted that argument. Frank's also argued that its obligation to provide insurance to Marine was contingent upon Frank's obligation to indemnify Marine. Therefore, Frank's argued, since the indemnity provision was void under Section 905(b), the additional assured provisions were inapplicable, because the contract conditioned the insurance requirement on there being a valid indemnity provision. Frank's now for the first

43. See Supreme Court Rule 10.

time takes the position that Section 905(b)'s prohibition against indemnity also voids the additional assured requirement. Previously, it contended that Section 905(b)'s invalidation of the indemnity provision had the effect of invalidating the additional assured provision because of the terms of the contract. As Frank's failed to previously argue that Section 905(b) invalidates an additional assured provision, it has waived any argument it might have presented regarding the perceived incorrectness of the Fifth Circuit's ruling in *Voisin*, and the Ninth Circuit's ruling in *Price*.[44]

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44. *See Goldin v. Bartholow*, 166 F.3d 710, 716 n.3 (5th Cir. 1999); *Applewhite v. Reichhold Chemicals*, 67 F.3d 571, 573 (5th Cir. 1995).

CONCLUSION

The necessary elements for the Court to grant a writ of certiorari are completely absent in this case. The Fifth Circuit's decision in the instant case is not in conflict with any decision of this Court construing Section 905(b). Further, the Fifth Circuit's decision is not contrary to decisions rendered by other circuit courts. Rather, the Fifth Circuit's decision is fully supported by and consistent with the decision of the Ninth Circuit Court of Appeals in *Price v. Zim Israel Navigation Co., Ltd.*, which is the only decision of another federal court of appeals on point.

Frank's has further failed to point out any other consideration, which merits review by this Court. Rather, this is nothing more than a contract interpretation case with only a tangential connection to Section 905(b). Accordingly, the Petition for Writ of Certiorari filed herein should be denied.

Respectfully submitted,

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